STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223

April 14, 1993

Ms. Donna Searcy
Secretary of the Federal
Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matters of Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5-29.5 Ghz Frequency Bands and to Establish Rules and Policies for Local Multipoint Distribution Service -- CC Docket No. 92-297

Dear Ms. Searcy:

The New York State Department of Public Service (NYDPS) submits these reply comments in response to the Federal Communications Commission (Commission) Notice of Proposed Rulemaking (Notice) for the designation of the 28 Ghz band to a new service titled Local Multipoint Distribution Service (LMDS), and for the establishment of new rules for the use of the technology. The NYDPS supports new technologies which can widen the range of telecommunications services available to the public as well as increase the level of competition among telecommunications services providers. However, the Notice raises concerns regarding the proper approach for regulating these new services under the Communications Act.

First, the Commission requests comment upon the appropriate regulatory status to be afforded to LMDS licensees, and whether service providers should be allowed to elect common carrier or non-common carrier status (Notice, para. 26). The Commission should evaluate the nature and type of services to be offered and require that licensees that act as common carriers be treated as common carriers rather than allow them to determine their own regulatory status. "It has long been held that 'a common carrier is such by virtue of his occupation,' that is by the actual activities he carries on." National Ass'n of Reg. Util. Comm'rs v. F.C.C., 533 F.2d 601, 608 (D.C. Cir. 1976) citing Washington ex rel. Stimson Lumber Co. v. Kuykendall, 275

U.S. 207, 211-12, 48 S.Ct. 41, 42, 72 L.Ed. 241, 245 (1927); United States v. California, 297 U.S. 175, 181, 56 S.Ct. 421, 80 L.Ed. 567 (1936).

In this instance, with the limited information available on the likely applications of this new technology, it appears that it will be used for common carrier type services. In fact, Suite 12, the developer of this new technology, states in its comments that LMDS "will provide commercially significant telephone company-type services". (Suite 12, Initial Comments, page 5). Thus, the Commission should establish that services using LMDS technology be regulated as common carriers, until and unless a particular provider demonstrates that it is providing non-common carrier services.

Next, the Commission seeks information on whether it should preempt state regulation of intrastate common carrier and non-common carrier services using this technology (Notice, Paras. 28 and 29). As we have stated on many occasions, Section 152(b) of the Communications Act fences off from Commission authority all matters "for or in connection with intrastate communications services *** of any carrier." The Commission may not use its authority under Section 151 to preempt state regulation. Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 374 (1986). Moreover, with respect to any service that may be classified as non-common carrier, the record does not provide a basis for establishing the Commission's jurisdiction under any other title of the Act.

Even if the Commission could preempt the states under the Communications Act, the record in this proceeding does not contain sufficient information on the specific services to be provided and the extent to which specific state regulations conflict with the interstate provision of common carrier or non-common carrier LMDS.

It is entirely possible that LMDS will be an intrastate service. According to Suite 12, [1/] the service may be specifically designed for each cell, with each cell being about 6 miles wide in New York. Under those circumstances, the service may be wholly intrastate.

Moreover, the severability of intrastate and interstate LMDS telecommunications services cannot be determined from the record to date. Suite 12 does not provide any specific factual information about the [illegible] which would establish its

being more fully developed, the Commission has the opportunity to require that the technology be capable of determining the jurisdictional nature of the service.

Finally, none of the commenters, including Suite 12, give examples of specific state regulations which would conflict with the Commission's goals or proposals. As the Court in The People of California v. FCC, (905 F.2d 1217, 1240 (9th Cir. 1990)), clearly stated "The FCC bears the burden of justifying its entire preemption order by demonstrating that the order is narrowly tailored to preempt only such state regulations as would negate valid FCC regulatory goals." It cannot make such a showing here.

Sincerely,

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